

401 KAR 5:075. Cabinet review procedures for KPDES permits.

RELATES TO: KRS 224.01-010, 224.01-070, 224.01-400, 224.70-100, 224.70-120, 224.99-010, 33 U.S.C. 1251 et seq.

STATUTORY AUTHORITY: KRS 224.10-100, 224.16-050, 224.70-110, 33 U.S.C. 1251 et seq., 1342

NECESSITY, FUNCTION, AND CONFORMITY: KRS 224.10-100 authorizes the Environmental and Public Protection Cabinet to issue, continue in effect, revoke, modify, suspend or deny under such conditions as the cabinet may prescribe, permits to discharge into any waters of the Commonwealth. KRS 224.16-050(1) establishes that the cabinet may issue federal permits pursuant to 33 USC Section 1342(b) of the Federal Water Pollution Control Act (33 USC Section 1251 et seq.) subject to the conditions imposed in 33 USC Section 1342(b) and (d). This administrative regulation sets forth the procedures through which the cabinet will follow in receiving permit applications, preparing draft permits, issuing public notice, inviting public comment and holding public hearings on draft permits.

Section 1. Review of the Application. (1) Any person who requires a permit under the KPDES program shall complete, sign, and submit to the cabinet an application for the permit as required under [401 KAR 5:060](#), Section 1. Applications shall not be required for KPDES general permits. Operators who elect to be covered by a general permit shall submit written notification to the cabinet at the time the cabinet indicates in Section 3 of this administrative regulation.

(2) The cabinet shall not begin the processing of a permit until the applicant has fully complied with the application requirements for the permit, as required by [401 KAR 5:060](#), Section 1.

(3) Permit applications shall comply with the signature and certification requirements of [401 KAR 5:060](#), Section 9.

(4) The cabinet shall review for completeness every application for a KPDES permit. Each application submitted by a KPDES new source or KPDES new discharger shall be reviewed for completeness by the cabinet within thirty (30) days of its receipt. Each application for a KPDES permit submitted by an existing source shall be reviewed for completeness within sixty (60) days of receipt. Upon completing the review, the cabinet shall notify the applicant in writing whether the application is complete. If the application is incomplete, the cabinet shall list the information necessary to make the application complete. If the application is for an existing source, the cabinet shall specify in the notice of deficiency a date for submitting the necessary information. The cabinet shall notify the applicant that the application is complete upon receiving this information. After the application is completed, the cabinet may request additional information from an applicant if necessary to clarify, modify, or supplement previously submitted material. Requests for the additional information shall not render an application incomplete.

(5) If an applicant fails or refuses to correct deficiencies in the application, the permit may be denied and appropriate enforcement actions may be taken under KRS Chapter 224 and administrative regulations promulgated pursuant thereto.

(6) If the cabinet decides that a site visit is necessary for any reason in conjunction with the processing of an application, the cabinet shall notify the applicant and a date shall be scheduled.

(7) The effective date of an application shall be the date on which the cabinet notifies the applicant that the application is complete as provided in subsection (4) of this section.

(8) For each application from a major facility new source, or major facility new discharger, the cabinet shall no later than the effective date of the application, prepare and mail to the applicant a project decision schedule. The schedule shall specify target dates by which the cabinet intends to:

- (a) Prepare a draft permit;
- (b) Give public notice;
- (c) Complete the public comment period, including any public hearing;
- (d) Issue a final permit; and

(e) Complete any formal proceedings under this administrative regulation.

(9) Conflicts of interest.

(a) Any person who issues a permit shall be subject to the conflict of interest provisions of KRS [11A.020](#) and [11A.030](#). The director of the Division of Water shall not receive or have received during the previous two (2) years, a significant portion of income directly or indirectly from permit holders or applicants for a permit.

(b) Any person aggrieved by the issuance of a permit under the KPDES administrative regulations may challenge the permit pursuant to Section 13 of this administrative regulation if paragraph (a) of this subsection has been violated.

(c) The hearing officer shall remand any permit issued in violation of paragraph (a) of this subsection to the cabinet for reconsideration.

(d) Following remand, any cabinet employee who reconsiders the permit shall be subject to the conflict of interest provisions set forth in paragraph (a) of this subsection. The reconsideration shall require a new public comment period and public hearing only if information offered during earlier permit proceedings was excluded by the cabinet as a direct result of a conflict of interest.

Section 2. Review Procedures for Permit Modification, Revocation and Reissuance, or Revocation. (1) Permits may be modified, revoked and reissued, or revoked either at the request of any interested person, including the permittee, or upon the cabinet's initiative. Permits may only be modified, revoked and reissued, or revoked for the reasons specified in [401 KAR 5:070](#), Sections 6 or 7. All requests shall be in writing and shall contain facts or reasons supporting the request.

(2) If the cabinet decides the request is not justified, the cabinet shall send the requester a brief written response giving a reason for the decision. Denials of requests for modification, revocation and reissuance, or revocation shall not be subject to public notice, comment, or hearings.

(3) If the cabinet tentatively decides to modify or revoke and reissue a permit under [401 KAR 5:070](#), Section 6, the cabinet shall prepare a draft permit under Section 3 of this administrative regulation incorporating the proposed changes. The cabinet may request additional information and, in the case of a modified permit, may require the submission of an updated permit application. In the case of revoked and reissued permits, the cabinet shall require the submission of a new application.

(a) In a permit modification under this section, only those conditions to be modified shall be reopened when a new draft permit is prepared. All other aspects of the existing permit shall remain in effect for the duration of the unmodified permit. If a permit shall be revoked and reissued under this section, the entire permit is reopened as if the permit had expired and was being reissued. During any revocation and reissuance proceeding, the permittee shall comply with all conditions of the existing permit until a new final permit is reissued.

(b) "Minor modifications" as described in [401 KAR 5:070](#), Section 6(3) shall not be subject to the requirements of this section.

(4) If the cabinet preliminarily decides to revoke a permit under [401 KAR 5:070](#), Section 7, the cabinet shall issue a notice of intent to revoke. A notice of intent to revoke shall be a type of draft permit which follows the same procedure as any draft permit prepared under Section 3 of this administrative regulation.

Section 3. Draft Permits. (1) Once an application is complete, the cabinet shall preliminarily decide whether to prepare a draft permit or to deny the application.

(2) If the cabinet makes a preliminary decision to deny the permit application, the cabinet shall issue a notice of intent to deny. A notice of intent to deny the permit application shall be a type of draft permit which follows the same procedure as any draft permit prepared under this section. If the cabinet's determination under Section 11 of this administrative regulation is that the

preliminary decision to deny the permit application was incorrect, the cabinet shall withdraw the notice of intent to deny and proceed to prepare a draft permit under subsection (4) of this section.

(3) If the cabinet makes a preliminary decision to issue a KPDES general permit, the cabinet shall prepare a draft general permit in accordance with subsection (4) of this section.

(4) If the cabinet decides to prepare a draft permit, the cabinet shall prepare a draft permit that contains the following information:

- (a) All conditions under [401 KAR 5:065](#), Section 1;
- (b) All compliance schedules under [401 KAR 5:070](#), Section 2;
- (c) All monitoring requirements under [401 KAR 5:070](#), Section 3; and
- (d) Effluent limitations, standards, prohibitions, and conditions under [401 KAR 5:057](#), [401 KAR 5:060](#), [401 KAR 5:065](#), [401 KAR 5:070](#), [401 KAR 5:075](#), and [401 KAR 5:080](#) and all variances that are to be included.

(5) All draft permits prepared by the cabinet under this section shall be accompanied by a fact sheet and shall be based on the administrative record, publicly noticed, and made available for public comment. The cabinet shall give notice of opportunity for a public hearing, issue a final decision, and respond to comments. A demand for a hearing may be made pursuant to [KRS 224.10-420](#) and Section 13 of this administrative regulation following the issuance of a final decision.

Section 4. Fact Sheets. (1) A fact sheet shall be prepared for every draft permit for a major KPDES facility or activity, for every KPDES general permit, for every KPDES draft permit that incorporates a variance or requires an explanation under subsection (3) of this section, and for every draft permit which the cabinet finds is the subject of widespread public interest or raises major issues. The fact sheet shall briefly set forth the principal facts and the significant factual, legal, methodological, and policy questions considered in preparing the draft permit. The cabinet shall send this fact sheet to the applicant and, on request, to any other persons.

- (2) The fact sheet shall include, if applicable:
 - (a) A brief description of the type of facility or activity which is the subject of the draft permit;
 - (b) A quantitative and qualitative description of the discharges described in the application;
 - (c) A brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions;
 - (d) Reasons why any requested variances or alternatives to required standards do or do not appear justified;
 - (e) A description of the procedures for reaching a final decision on the draft permit including:
 - 1. The beginning and ending dates of the comment period under Section 5 of this administrative regulation and the address where comments will be received;
 - 2. Procedures for requesting a hearing and the nature of that hearing;
 - 3. Any other procedures under [KRS 224.10-420](#) and Section 13 of this administrative regulation by which the public may participate in the final decision;
 - (f) Name and telephone number of a person to contact for additional information; and
 - (g) Any calculations or other necessary explanation of the derivation of specific effluent limitations and conditions, including a citation to the applicable effluent limitation guidelines or performance standard provisions, and reasons why they are applicable or an explanation of how the alternate effluent limitations were developed.

(3)(a) If the draft permit contains any of the following conditions, an explanation of the reasons why the conditions are applicable:

- 1. Limitations to control toxic pollutants under [401 KAR 5:065](#), Section 2(5);
- 2. Limitations on internal waste streams under [401 KAR 5:065](#), Section 3(8);
- 3. Limitations on indicator pollutants under [401 KAR 5:080](#), Section 1(2)(a);
- 4. Limitations set on a case-by-case basis under [401 KAR 5:080](#), Section 1(2)(c)2; or
- 5. Limitations to meet the criteria for permit issuance under [401 KAR 5:055](#), Section 2(7).

(b) For every permit to be issued to a treatment works owned by a person other than the Commonwealth or its subdivisions, an explanation of the cabinet's decision on regulation of users under [401 KAR 5:065](#), Section 2(12).

(4) If appropriate, a sketch or detailed description of the location of the discharge described in the application.

(5) Justification for waiver of any application requirements under [401 KAR 5:060](#), Section 5.

Section 5. Public Notice of Permit Actions and Public Comment Period. (1) Scope.

(a) The cabinet shall give public notice that the following actions have occurred:

1. A permit application has been preliminarily denied under Section 3(2) of this administrative regulation;

2. A draft permit has been prepared under Section 3(4) of this administrative regulation;

3. A hearing has been scheduled under Section 7 of this administrative regulation; or

4. A KPDES new source determination has been made in accordance with the definition in 401 KAR 5:002.

(b) Public notice shall not be required if a request for permit modification, revocation and reissuance, or revocation is denied under Section 2 of this administrative regulation. Written notice of that denial shall be given to the requester and to the permittee.

(c) Public notices may describe more than one (1) permit or permit action.

(2) Timing.

(a) Public notice of the preparation of a draft permit, including a notice of intent to deny a permit application, required under subsection (1) of this section shall allow at least thirty (30) days for public comment.

(b) Public notice of a public hearing shall be given at least thirty (30) days before the hearing. Public notice of the hearing may be given at the same time as public notice of the draft permit and the two (2) notices may be combined.

(3) Methods. Public notice of activities described in subsection (1)(a) of this section shall be given by the following methods:

(a) The cabinet shall mail a notice to the persons listed in subparagraphs 1 through 5 of this paragraph. Any person otherwise entitled to receive notice under this paragraph may waive their rights to receive notice for any classes and categories of permits.

1. The applicant, except for KPDES general permittees, and Region IV, EPA.

2. Federal and state agencies with jurisdiction over fish, shellfish, and wildlife resources, the Advisory Council on Historic Preservation, Kentucky Historical Society and other appropriate government authorities, including any affected states;

3. The U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service;

4. Any user identified in the permit application of a privately owned treatment works; and

5. Persons on a mailing list developed by:

a. Including those who request in writing to be on the list;

b. Soliciting persons for area lists from participants in past permit proceedings in that area; and

c. Notifying the public of the opportunity to be put on the mailing list through periodic publication in the public press and in such publications as newsletters, environmental bulletins, or state law journals. The cabinet may update the mailing list from time to time by requesting written indication of continued interest from those listed. The cabinet may delete from the list the name of any person who fails to respond to that request.

(b) For major permits and KPDES general permits, the cabinet shall publish a notice in a daily or weekly newspaper within the area affected by the facility or activity;

(c) In a manner constituting legal notice to the public under Kentucky law; and

(d) Any other method reasonably calculated to give actual notice of the action in question to the persons potentially affected by it, including press releases or any other forum or medium to elicit public participation.

(4) Contents.

(a) All public notices. All public notices issued under this administrative regulation shall contain the following minimum information:

1. Name and address of the office processing the permit action for which notice is being given;

2. Name and address of the permittee or permit applicant and, if different, of the facility or activity regulated by the permit, except for KPDES draft general permits under [401 KAR 5:055](#), Section 5;

3. A brief description of the business conducted at the facility or activity described in the permit application or the draft permit, for KPDES general permits if there is no application;

4. Name, address, and telephone number of a person from whom interested persons may obtain further information, including copies of the draft permit or draft general permit as the case may be, fact sheet, and the application;

5. A brief description of the comment procedures required by Sections 6 and 7 of this administrative regulation and the time and place of any hearing that will be held, including a statement of procedures to request a hearing, unless a hearing has already been scheduled, and other procedures by which the public may participate in the final permit decision;

6. A general description of the location of each existing or proposed discharge point and the name of the receiving water. For draft general permits, this requirement shall be satisfied by a map or description of the permit area; and

7. Any additional information considered necessary or proper.

(b) Public notices for hearings. In addition to the general public notice described in paragraph (a) of this subsection, the public notice for a permit hearing under Section 7 of this administrative regulation shall contain the following information:

1. Reference to the date of previous public notices, relating to the permit;

2. Date, time, and place of the hearing; and

3. A brief description of the nature and purpose of the hearing, including the applicable rules and procedures.

(c) Requests under [401 KAR 5:055](#), Section 7(4). In addition to the information required under subsection (4)(a) of this section, public notice of a KPDES draft permit for a discharge if a [401 KAR 5:055](#), Section 7(4) request has been filed under [401 KAR 5:055](#), Section 3, shall include:

1. A statement that the thermal component of the discharge is subject to effluent limitations under [401 KAR 5:065](#), Section 2(1) and a brief description, including a quantitative statement, of the thermal effluent limitations proposed under CWA Sections 301 or 306 (33 USC Sections [1311](#) or [1316](#)); and

2. A statement that a [401 KAR 5:055](#), Section 7(4), request has been filed and that alternative less stringent effluent limitations may be imposed on the thermal component of the discharge and a brief description, including a quantitative statement, of the alternative effluent limitations, if any, included in the request.

(5) In addition to the general public notice described in subsection (4)(a) of this section all persons identified in subsection (3)(a)1, 2, 3, and 4 of this section shall be mailed a copy of the fact sheet, the permit application (if any) and the draft permit (if any).

Section 6. Public Comments and Requests for Public Hearings. During the public comment period provided under Section 5 of this administrative regulation, any interested person may submit written comments on the draft permit and may request a public hearing, if no hearing has already been scheduled. A request for a public hearing shall be in writing and shall state the nature of the issues proposed to be raised in the hearing. All comments shall be considered in

making the final decision and shall be answered as provided in Section 12 of this administrative regulation.

Section 7. Public Hearings. (1) The cabinet shall hold a public hearing if a significant degree of public interest in a draft permit is found on the basis of requests. The cabinet also may hold a public hearing if, for instance, a hearing might clarify one (1) or more issues involved in the permit decision.

(2) Public notice of the hearing shall be given as specified in Section 5 of this administrative regulation.

(3) Any person may submit oral or written statements and data concerning the draft permit. Reasonable limits may be set upon the time allowed for oral statements, and the submission of statements in writing may be required. The public comment period under Section 5 of this administrative regulation shall automatically be extended to the close of any public hearing under this section. The cabinet may also extend the comment period by so stating at the hearing.

(4) A tape recording or written transcript of the hearing shall be made available to the public.

Section 8. Obligation to Raise Issues and Provide Information During the Public Comment Period. All persons, including applicants, who believe any condition of a draft permit is inappropriate or that the cabinet's preliminary decision to deny an application, revoke a permit, or prepare a draft permit is inappropriate, shall raise all reasonably ascertainable issues and submit all reasonably available arguments and factual grounds supporting their position, including all supporting material, by the close of the public comment period including any public hearing under Section 5 of this administrative regulation. All supporting materials shall be included in full and may not be incorporated by reference, unless they consist of state or federal statutes and regulations, EPA or the cabinet's documents of general applicability, or other generally available reference materials. Commenters shall make supporting material not already included in the record available to the cabinet as directed by the cabinet. A comment period longer than thirty (30) days may be necessary in complicated proceedings to give commenters a reasonable opportunity to comply with the requirements of this section. Commenters may request longer comment periods, which may be established under Section 5 of this administrative regulation. Nothing in this section shall be construed to prevent any person aggrieved by a final permit decision from filing a demand for a hearing under [KRS 224.10-420](#) and Section 13 of this administrative regulation.

Section 9. Conditions Requested by the Corps of Engineers and Other Government Agencies.

(1) If during the comment period for a KPDES draft permit, the district engineer of the Corps of Engineers advises the cabinet in writing that anchorage and navigation of any of the waters of the Commonwealth would be substantially impaired by the granting of a permit, the permit shall be denied and the applicant so notified. If the district engineer advises the cabinet that imposing specified conditions upon the permit is necessary to avoid any substantial impairment of anchorage or navigation, then the cabinet shall include the specified conditions in the permit. Review or appeal of denial of a permit or of conditions specified by the district engineer shall be made through the applicable procedures of the Corps of Engineers, and shall not be made through the procedures provided in this administrative regulation. If the conditions are stayed by a court of competent jurisdiction or by applicable procedures of the Corps of Engineers, those conditions shall be considered stayed in the KPDES permit for the duration of that stay.

(2) If during the comment period the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, or any other state or federal agency with jurisdiction over fish, wildlife, or public health advises the director in writing that the imposition of specified conditions upon the permit is necessary to avoid substantial impairment of fish, shellfish, or wildlife resources, the cabinet may

include the specified conditions in the permit to the extent they are determined necessary to carry out the provisions of KRS Chapter 224.

(3) In appropriate cases the cabinet may consult with one (1) or more of the agencies referred to in this section before issuing a draft permit and may reflect their views in the fact sheet or the draft permit.

Section 10. Reopening of the Public Comment Period. (1) If any data information or arguments submitted during the public comment period appear to raise substantial new questions concerning a permit, the cabinet may take one (1) or more of the following actions:

(a) Prepare a new draft permit, appropriately modified, under Section 3 of this administrative regulation;

(b) Prepare a revised fact sheet under Section 4 of this administrative regulation and reopen the comment period; or

(c) Reopen and extend the comment period under Section 5 of this administrative regulation to give interested persons the opportunity to comment on the information or arguments submitted.

(2) Comments filed during the reopened comment period shall be limited to the substantial new questions that caused its reopening. The public notice under Section 5 of this administrative regulation shall define the scope of the reopening.

(3) Public notice of any of the above actions will be issued under Section 5 of this administrative regulation.

Section 11. Issuance and Effective Date of Permit. (1) After the close of the public comment period under Section 5 of this administrative regulation, the cabinet shall issue, deny, modify, revoke and reissue, or revoke a permit. The cabinet shall notify the applicant and each person who has submitted written comments or requested notice of that determination. This notice shall include reference to the procedures for appealing the decision. For the purpose of this section, a final permit decision shall mean a final decision to issue, deny, modify, revoke and reissue, or revoke a permit.

(2) A final permit decision shall become effective thirty (30) days after the service of notice of the decision under subsection (1) of this section, unless:

(a) A later effective date is specified in the decision;

(b) A stay is granted pursuant to [KRS 224.10-420\(2\)](#) and Section 13 of this administrative regulation; or

(c) No comments requested a change in the draft permit, and if that occurs, the permit shall become effective immediately upon issuance.

(3) The determination which is a condition precedent to demanding a hearing under [KRS 224.10-420\(2\)](#) and Section 13 of this administrative regulation shall be the final permit decision. The thirty (30) day appeal period shall begin on the date the determination is entered by the cabinet and shall not begin on the date the permit decision becomes effective.

Section 12. Response to Comments. (1) When any final permit decision is issued under Section 11 of this administrative regulation the cabinet shall issue a response to comments. This response shall:

(a) Specify which provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change; and

(b) Briefly describe and respond to all significant comments on the draft permit raised during the public comment period or during any hearing. This response shall fully consider all comments resulting from any hearing conducted under this administrative regulation.

(2) The response to comments shall be available to the public. Any demand for a hearing on this response shall be filed according to procedures specified in [KRS 224.10-420](#), [224.10-440](#), [224.10-470](#) and any administrative regulations promulgated pursuant thereto.

Section 13. Hearings under [KRS 224.10-420](#). (1) A determination under Section 11 of this administrative regulation when issued by the cabinet shall be subject to a demand for a hearing pursuant to [KRS 224.10-420\(2\)](#).

(2) Any person aggrieved by the issuance of a final permit may demand a hearing pursuant to [KRS 224.10-420\(2\)](#).

(3) Any hearing held pursuant to this section shall be subject to the provisions of KRS [224.10-440](#) and [224.10-470](#).

(4) Failure to raise issued pursuant to Section 8 of this administrative regulation shall not preclude an aggrieved person from making a demand for a hearing pursuant to [KRS 224.10-420\(2\)](#). (9 Ky.R. 874; Am. 1136; eff. 6-1-83; 12 Ky.R. 554; eff. 12-10-85; 20 Ky.R. 3285; 21 Ky.R. 432; eff. 8-24-94; 29 Ky.R. 1087; 1597; eff. 12-18-02; TAm eff. 8-9-2007.)